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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 615

DANNY ESCOBEDO,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR THE RESPONDENT.

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SUMMARY OF ARGUMENT.

A.

The record here shows that petitioner, a twenty-two year old married man and the father of a child confessed to the crime of murder approximately one and a half hours after being taken into custody. Though he was questioned intermittently by several officers at different times, the questioning was neither continuous, nor of long duration and was not conducted in "relays" of police officers. Petitioner agreed to make a statement shortly after being confronted by a co-defendant, Benedict DiGerlando, who accused him of murdering Manuel Valtierra, petitioner's

brother-in-law, although he had not confessed while in custody after being arrested some ten days earlier.

While at the police station, and before admitting his guilt, petitioner requested the opportunity to confer with counsel. His attorney, who was then present, attempted to see petitioner but was told by police that he had been in custody only a short time and was being questioned. Such factors were not coercive however because:

(1) petitioner had consulted daily with his counsel during the ten day period between his first and second arrests.

(2) petitioner was aware of his constitutional right to be free from self incrimination and was specifically told by his counsel not to answer police questions.

(3) petitioner's counsel made a sign to him through an open door at the police station which he interpreted to mean that his lawyer's command of silence was still in effect. This occurred prior to the giving of the confession.

There is nothing in this record to show that petitioner has less than normal intelligence, maturity, judgment or education. He was not shown to be specially susceptible to police pressure or easily misled by police authority. And though petitioner testified that forbidden promises of immunity were made they were squarely denied by the police and are foreclosed on this review.[1]

In short, the evidence in this case compels the conclusion that petitioner's confession was, beyond question, voluntary in nature.

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1. *Watts* v. *Indiana*, 338 U. S. 49, 51-52; *Thomas* v. *Arizona*, 356 U. S. 390, 402-403.

B.

Crooker v. *California*, 357 U. S. 504 and *Cicenia* v. *La Gay*, 357 U. S. 433 hold that the denial of petitioner's request for counsel during police questioning was not a denial of the right to counsel protected by the due process clause of the fourteenth amendment.[2] *Crooker* and *Cicenia* should not be overruled because:

(1) the rule they lay down is consistent with fundamental fairness and effects a balance between society's interest in law enforcement—giving police the right of reasonable, private questioning of suspects in attempts to solve difficult and brutal crimes—and the individual's right to liberty—allowing free reign to the doctrine that confessions which are extorted, coerced or obtained under circumstances inconsistent with due process will be excluded from evidence.

(2) such a course would, without question, eliminate confessions, an indispensable tool of law enforcement, from the arsenal of the police in their struggle with crime.

(3) an intolerable burden of administration would be thrust upon local police who would be utterly incapable of insuring effective representation by counsel to all persons taken into custody from the moment of their arrest.

(4) the extension of the right to counsel to the time of arrest would be utterly inconsistent with "those procedures that are fair and feasible in the light of [now] existing values and capabilities."[3]

(5) such a ruling would cripple law enforcement to

2. Beaney, *Right To Counsel Before Arraignment*, 45 Minn. L. Rev. 771, 777 (1961).

3. Schaefer, *Federalism And State Criminal Procedure*, 70 Harv. L. Rev. 1, 6 (1956).

an extreme degree without affording a significant counter-balancing gain in society's respect for individual liberties. The impact of this Court's decisions in *Mapp* v. *Ohio*, 367 U. S. 643 and *Gideon* v. *Wainwright*, 372 U. S. 335 upon the enforcement of state criminal law would pale by comparison.

(6) those commentators upon whom this Court has relied in the past, and who count among those with no hostility to the fullest enjoyment of individual constitutional rights, agree that the extension of the right to counsel to the time of arrest would be unrealistic in today's society.[4]

4. Kamisar, *The Right To Counsel And The Fourteenth Amendment: A Dialogue On "The Most Persuasive Right" Of An Accused*, 30 U. Chi. L. Rev. 1, 11 (1962); Beaney, *Right To Counsel Before Arraignment*, 45 Minn L. Rev. 771, 781 (1961).

ARGUMENT.

I.

THE RECORD IN THIS CASE ESTABLISHES THAT THE CONFESSION OF PETITIONER WAS VOLUNTARY AND THAT ITS ADMISSION INTO EVIDENCE WAS NOT A VIOLATION OF DUE PROCESS.

The first challenge to the confession in this case raises the issue of voluntariness. The totality of the circumstances surrounding the making of the confession, petitioner contends, compels the conclusion that it was not voluntarily made.

We agree that this court must determine the nature of the confession from "an examination of all the attendant circumstances." (*Haynes* v. *Washington*, 373 U. S. 503, 513.) We do not agree that such an examination will disclose that petitioner's "will was overborne at the time he confessed." (*Lynumn* v. *Illinois*, 372 U. S. 528, 534.) We believe the Court will find from a close scrutiny of this record that, without question, the confession here involved was voluntary under the teachings of the prior cases in this Court. We turn then, to a discussion of those elements petitioner deems relevant to the determination of this question.

A.

The Refusal of the Police to Allow Consultation With Counsel.

Haynes v. *Washington*, 373 U. S. 503 and *Gallegos* v. *Colorado*, 370 U. S. 49 have authoritatively determined that the absence of counsel during police questioning is "unquestionably a circumstance which the accused is en-

titled to have appropriately considered in determining voluntariness and admissibility of his confession," regardless of "whatever independent consequence [this factor] may otherwise have." (373 U. S. at 517.) The facts of this case, however, do not show that the "denial" of counsel here contributed to a coercive atmosphere which ultimately produced an involuntary statement on the part of petitioner.

In both *Haynes* and *Gallegos*, the defendants confessed in the absence of any prior consultation with, or advice from, an attorney. And though Gallegos was told of his right to counsel, this Court found that his youth precluded any assumption that he was "a person . . . [equal] to the police in knowledge and understanding of the consequences of the questions and answers being recorded."[5]

The present case is manifestly different because:

(1) Petitioner had been released from police custody ten days earlier through the effort of his counsel in obtaining a writ of habeas corpus (R. 8, 16);

(2) Petitioner had consulted daily with his counsel concerning this case during the ten day period from January 20 (the date of the first arrest) to January 30 (the date of the second arrest) (R. 8);

(3) Petitioner told the police that his attorney had warned him not to answer police questions and had instructed him to refuse to answer until he "had the advice of my lawyer." (R. 20-21);

(4) Petitioner saw his attorney in the police station before confessing and interpreted a wave or motion made by his attorney to mean that he should not speak to the police, thus reinforcing his earlier advice (R. 28).

5. *Gallegos* v. *Colorado*, 370 U. S. 49, 54.

These circumstances are absent from any case in this Court where, considering the lack of counsel as one element in the total atmosphere of coercion, this Court has rejected a confession in a state criminal case as involuntary. (See *Gallegos* v. *Colorado*, 370 U. S. 49; *Haynes* v. *Washington*, 373 U. S. 503; *Haley* v. *Ohio*, 332 U. S. 596). On the other hand, they most nearly resemble the facts of *Cicenia* v. *La Gay*, 357 U. S. 504, where, contrary to petitioner's assumption, this Court did consider and decide the issue of voluntariness and found that "petitioner failed to substantiate the charge that his confession was coerced" (357 U. S. at 508), and *Crooker* v. *California*, 357 U. S. 433, where this Court found that the possibility of coercion was "negated by petitioner's age, intelligence, and education" as well as his obvious awareness of the right to refuse to answer questions.

Petitioner here was two years older than Cicenia, and while younger than Crooker, he was a mature man of twenty-two years who was married and the father of a child. Though petitioner did not make any record below concerning the extent of his formal education, we have the express finding of the trial judge, relied upon by the Supreme Court of Illinois in reaching its conclusion that the confession was voluntary, that:

> "I was impressed with this defendant's intelligence . . . he certainly is not ignorant by a long stretch of the imagination. He is pretty keen. . . ." (R. 41.)

Petitioner contends also that "the evil of the denial of the right of petitioner and his counsel to consult with each other is *compounded* by the fact that the police refused this right *despite a positive state statute granting it.*" (Br. 12) (Emphasis added.) Here petitioner misreads Illinois law. The question of whether these statutes allow consultation with counsel before or during police questioning which follows arrest was authoritatively determined con-

trary to petitioner's contentions by the Supreme Court of Illinois in the very opinion now pending for review in this Court—*People* v. *Escobedo*, 28 Ill. 2d 41, 190 N. E. 2d 825. In reaching this conclusion, the Supreme Court of Illinois held:

> "Defendant, of course, had the right to consult with counsel at the pretrial stages of the criminal proceeding . . . (citing Ch. 38, §§ 449.1, 477, Ill. Rev. Stat., 1959).[6] These statutes show a legislative policy against the police or other public officers insulating a person from his attorney, *but it does not follow that the legislature intended that the statutes operate to insulate the person from the police or other public officials.*" 28 Ill. 2d at 51-52, 190 N. E. 2d at 830-831 (R. 133). (Emphasis added.)

We interpret this language to mean not that the Illinois Supreme Court sanctioned the admissibility of the confession despite a violation of state law, but rather that the court was holding that refusal to allow consultation with counsel before or during post-arrest interrogation was *not* a violation of state law. This reading of the opinion is strengthened by the additional conclusion of the Supreme Court of Illinois that:

> "Having given due weight to the various considerations involved, we are of the opinion that the right of a person in custody to see and consult with his attorney does not deprive the police of their right to *a reasonable opportunity to interrogate outside the presence of counsel.*" 28 Ill. 2d at 52; 190 N. E. 2d at 831 (R. 133-134). (Emphasis added.)

The statutes upon which petitioner relies, therefore, to reach the conclusion the "evil" of the absence of counsel was "compounded" by police activity, illegal even under Illinois law, have been interpreted by the highest court of

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6. Transferred in 1961 to Ch. 38, §§ 736(b), 736(c) Ill. Rev. Stat. (1961).

Illinois to allow the police conduct in question here for a reasonable period of time following arrest.

B.

The Knowledge of Constitutional Rights.

Petitioner claims that the failure of the police to warn him concerning his constitutional rights contributed to the involuntariness of the confession. How this claim may be maintained in the teeth of a record that fairly shouts the conclusion that petitioner was entirely aware of his rights we do not understand. Consider:

(1) Petitioner knew that his attorney had been able to effect his release from police custody for the homicide in question on a prior occasion.

(2) Petitioner consulted daily, for a period of ten days, with his retained attorney concerning the very homicide investigation which led to his re-arrest. Of what earthly good would such consultations be if they did not concern the subject of petitioner's rights should he again be subjected to police custody?

(3) But, says petitioner, his "attorney had not explained to petitioner the *substance* of all his various rights but had merely told petitioner what to do and say, but not *why*." (Br. 19) (Emphasis added.) Whether this subsumes that only a lecture worthy of *Constitutional Law 101* will suffice to protect a prisoner from a misunderstanding of his right to remain free from self-incrimination we do not know, but surely, if petitioner is correct in this argument, then it follows that even if counsel had been allowed to confer with Escobedo at the police station he would have told him no more,

and probably would have told him less, than he had told him in the prior daily conferences.

Given counsel's present concession that Escobedo entered the police station on the night of January 30 armed with his lawyer's prior explanations of "the substance of all his various rights" and specific instructions of "what to do and say" (Br. 30), then it is clear that the rationale of such cases as *Gallegos* and *Haynes* do not compel a reversal here. Moreover, we do not understand petitioner's attempt to distinguish *Crooker* on the ground that "the denial of counsel was held non-prejudicial [there] because the accused knew of, and exercised, his constitutional rights." (Br. 20.) Assuredly, Crooker exercised his constitutional right to remain silent until the point when he decided to abandon that right and confess. But the same is true of petitioner here. He at first refused to answer police questions and denied all knowledge of the homicide, citing in support of his refusal, *inter alia*, the injunction of his lawyer not to talk. He then abandoned this position and answered police questions. *Crooker*, therefore, is not distinguishable, but decisive, on this issue.

C.

Incommunicado Detention.

It is certainly true that from the time of defendant's arrest to the time he confessed he was in the custody of the police and that he was not seen by any friend, save co-defendant Chan, or relative. So far as the record reflects, no friend or relative asked to see him and he did not ask to see them. And while his lawyer was refused admittance for the purpose of consultation, the "coercive atmosphere of incommunicado detention," if it existed, was broken by

the sight of his lawyer through the open door and the receipt of the signal reinforcing the earlier advice of the lawyer not to talk to the police.

Detention in the custody of police, however, is the common thread of every confession case coming to this Court. Rarely, if ever, do arrestees confer with family and friends before confessing. And here the period between arrest and confession was only a little over an hour and a half, certainly one of the shortest times to be considered by the Court in a case of this kind. Ten days earlier petitioner had been held by the police before being released on a writ of habeas corpus. He did not confess during this "incommunicado" detention. It is inconceivable that one and a half hours of detention contributed to the coercion of any statement on January 30. See: *Crooker* v. *California*, 357 U. S. 433, 437; *Stein* v. *New York*, 346 U. S. 156, 184-188.

D.

The Accusation of Co-Defendant DiGerlando.

The claim is made that the "device" of confronting petitioner with his later co-defendant, Benedict DiGerlando, who accused petitioner of shooting Manuel Valtierra, was a "[method] of psychological coercion" that contributed to the making of an involuntary statement (Br. 22). Heavy reliance is placed upon the decision of this Court in *Bram* v. *United States*, 168 U. S. 532, to sustain the proposition that to *accuse* one of a crime during interrogation is inherently coercive. If the prisoner refuses to answer, so the argument runs, his silence will be taken as an indication of guilt so that he is forced either to directly admit guilt or to deny guilt in an inculpatory manner. And since the prisoner is driven to one course or another by the accusation, the argument concludes, any reaction to the accusation must be involuntary.

This result, we fear, is reached only by a less than careful reading of an opinion which Mr. Justice White was at pains to draw most carefully. The admission in *Bram* was not suppressed because it was the product of an accusation of guilt. It was suppressed because of the conjunction of a number of circumstances which this Court felt contributed to a total atmosphere of coercion. Among them:

(1) Bram was clapped in irons aboard ship and then taken to the police authorities as a murder suspect.

(2) Upon reaching the interrogation room, Bram was stripped of his clothing and questioned.[7]

(3) The interrogator assumed that Bram had an accomplice and urged him to confess and name that person in language which this Court thought implied a forbidden promise of leniency.[8]

The opinion in *Bram* is clear, therefore, that it was a combination of all these circumstances that rendered the admission involuntary—this Court did not hold in *Bram* that incriminating statements which follow accusations of guilt are *per se* involuntary.[9] No court has ever gone that far, and with reason. For this very record demonstrates that on at least three separate occasions petitioner simply denied his guilt—was neither silent nor made inculpatory admissions—when directly accused by the police

7. Compare *Malinski* v. *New York*, 324 U. S. 401, 405.

8. Compare *Lynumn* v. *Illinois*, 372 U. S. 530, 535.

9. "... that is to say, *when all the surrounding circumstances are considered in their true relations*, not only is the claim that the statement was voluntary overthrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind. * * * Although these facts may not, when isolated each from the other, be sufficient to warrant the inference that an influence compelling a statement had been exerted; yet, *when taken as a whole*, in conjunction with the nature of the communication made, they give room to the strongest inference that the statements of Bram were not made by one who, in law, could be considered a free agent." *Bram* v. *United States*, 168 U. S. 532, 18 S. Ct. 183, 194-195 (Emphasis added.)

of shooting Valtierra, and then attributed his confession to several different influences at various times in his testimony.

In the squad car on the way to the police station, just minutes after his arrest:

> "The detectives said they had us [petitioner and his sister, the wife of the murdered Valtierra] pretty well, up pretty tight, and we might as well admit to this crime.
> *I said, 'I still don't know anything of what you are talking about'.*" (R. 17.) (Emphasis added.)

After arriving at headquarters:

> "Then, this one detective, whose name is unknown to me, walked up to me and said: that DiGerlando, that they had proof that I had done the shooting, *and I said, 'I am sorry but I would like to have advice from my lawyer'.*" (R. 17.) (Emphasis added.)

And later:

> "Shortly after that he came back and said they had a witness that said he had seen me shoot my brother-in-law, in the next room. *I said I would like to see my lawyer.*" (R. 17.) (Emphasis added.)

If one believes petitioner, and depending upon which of petitioner's statements one believes, he confessed for reasons having nothing to do with any coercive factors which can find support in the record.

First, petitioner testified, he confessed to no one but Assistant State's Attorney Cooper (R. 21). He did not confess to Officer Montejano (R. 18) and he did not confess to Captain Flynn (R. 18, 22).

He confessed to Cooper because:

> (1) "I saw that my sister was being put at the head of this crime and I knew she had not done it and I wanted to help my sister and that is the reason why I made the statement." (R. 19.)

Comment: There is no testimony in this record

that the police put petitioner's sister "at the head of this crime" in conversations with him after arriving at police headquarters. If petitioner falsely confessed to save his sister, therefore, that has nothing to do with the police action in question here. The truth or falsity of petitioner's confession is not in issue[10] and is not before the Court.

Or petitioner confessed because:

(2) "The fact that I had been made promises by Montejano had a bearing upon my making this statement." (R. 19).

Comment: Montejano denied making the promises and that denial and its acceptance by the trial court and by the Supreme Court of Illinois are conclusive here.[11]

Or petitioner confessed because:

(3) "The fact that the police officers made promises specifically that I would not be prosecuted if I made this statement had an effect upon my making this statement. The promises were in fact the motivation that made me make this statement." (R. 19).

Comment: These promises were also denied and are not in issue here.

It may readily be seen, therefore, that petitioner's argument has undergone an easy metamorphosis between the Criminal Court of Cook County and the Supreme Court of the United States. There he contended that several reasons, none having anything to do with either police coercion proved by undisputed facts or the absence of counsel, were the motivating factors behind his confession. Here he contends that his confession was a false involuntary reply to a false allegation of guilt by DiGerlando (Br.

10. *Rogers* v. *Richmond*, 365 U. S. 534.

11. *Watts* v. *Indiana*, 338 U. S. 49, 51-52; *Thomas* v. *Arizona*, 356 U. S. 390, 402-403; *Rogers* v. *Richmond*, 365 U. S. 534, 536; *Haynes* v. *Washington*, 373 U. S. 515-516.

22). But the only reaction to this accusation which petitioner testified to below was that DiGerlando was "lying" and was "full of of shit"! (R. 25).

E.

The Employment of Relay Questioning.

In *Stein* v. *New York*, 346 U. S. 156, 184-185, Mr. Justice Jackson remarked that "Of course, such inquiries [police questioning] have limits. But the limits are not defined merely by calling an interrogation an 'inquisition,' which adds to the problem only the emotions inherited from medieval experience."

That kind of caution is applicable here, for petitioner's view now is that he was subject to "relay" questioning by the police and an Assistant State's Attorney. The technique of employing this label in the argument heading, however, while refraining from its use in the body of the argument (Br. 24-25), points up clearly the impropriety of the use of such a label to describe what actually occurred.

Though he does not cite them, petitioner apparently has in mind the conduct of a sort condemned by this Court in such cases as *Ashcraft* v. *Tennessee*, 322 U. S. 143 and *Haley* v. *Ohio*, 332 U. S. 596. In *Ashcraft*, the accused was questioned for a continuous period of thirty-six hours during which, by the testimony of the police themselves, he was questioned by officers in relays because the *police* "became so tired that *they* were compelled to rest." (322 U. S. at 149) (Emphasis added.) In *Haley*, a 15 year old Negro boy was questioned from midnight to dawn by officers working in relays. Certainly, these cases are inapposite.

To show "relay" questioning here petitioner is forced to total all the police officers involved, beginning with those

who made the arrest and including those who had any contact with him at the police station. But this is not the test. The critical inquiry must focus on the manner in which the *questioning* was carried out. And here both petitioner and police are in agreement that "relay" questioning, whatever that term imports, did not occur.

Petitioner testified that a detective who "was an elderly man, medium height, not too heavily built . . . questioned me when I first got into the office." (R. 17). He testified that Officer Montejano made promises to him although he denied making an incriminatory statement to Montejano (R. 17-18). He said that "There were a few police officers that came in and out of the room that asked me questions and told me that I had done it because the other person DiGerlando said I did, and I said I don't know anything about it." (R. 18). He testified that the only time he gave an inculpatory statement was to Assistant State's Attorney Cooper (R. 21).

Detective Montejano testified that the first time he questioned petitioner was about 10:00 P.M.; that petitioner was almost immediately confronted with DiGerlando who accused him of the shooting, and that he and, he believed, Officer O'Malley, questioned petitioner from approximately 10:00 to 10:10 P.M. after which petitioner made a statement to Captain Flynn (R. 10-13). Captain Flynn testified that he first saw petitioner at approximately 10:30 P.M. and that petitioner orally confessed to him (R. 49-51). A written confession was thereafter given to the Assistant State's Attorney at approximately 11:50 P.M. (R. 64).

There is nothing in the evidence, therefore, to substantiate the claim that petitioner was questioned by "relays" of police officers.[12] Since petitioner's sister and, later co-

12. ". . . we have never gone so far as to hold that the Fourteenth Amendment requires a one-to-one ratio between interrogators and prisoners. . . ." *Stein* v. *New York*, 346 U. S. 156, 185.

defendants, DiGerlando and Chan were also being questioned at the same time (R. 98), it would not be out of the ordinary for officers to "come in and out of the room" where petitioner was being held to ask him questions for short periods of time during the course of the evening.

F.

The Legality of Petitioner's Arrest.

As we read the argument, petitioner now claims that his arrest was in violation of two Illinois statutes; that the arrest was therefore "illegal"; that the confession was the "fruit" of the "illegal" arrest and that *Wong Sun* v. *United States*, 371 U. S. 471 bars its use as evidence (Br. 25-27).

It should be made crystal clear, at this point in the argument, just what is, and what is not, at issue.

First, the legality of petitioner's arrest on January 30 is, as we understand it, challenged solely under Illinois law. That was the position taken in the Supreme Court of Illinois and in the Petition for Certiorari. The legality of petitioner's arrest under the Fourth Amendment, or as a matter of federal constitutional law, has never been, and is not properly now in issue.

Second, the record does not demonstate that petitioner's arrest on January 30 was in violation of Illinois law. It is said that it violated Ch. 65, § 26 Ill. Rev. Stat. (1959) which forbids imprisonment, restraint or custody "for the same cause" of one who has been discharged on a writ of habeas corpus. But the statute further provides:

> "The following shall *not* be deemed to be the *same cause*:
>
> 1. If, after a discharge for a *defect of proof*, or any material defect in the commitment, in a criminal

case, the prisoner should be again arrested *on sufficient proof*, and committed by legal process for the same offense.

* * * * *

3. Generally, whenever the discharge has been ordered on account of the non-observance of any of the forms required by law, the party may be a second time imprisoned if the cause be legal and the forms required by law observed." (Emphasis added.)

The record does not reflect what information, if any, the police had when they arrested petitioner 10 days earlier, or upon what state of facts they acted. The record does not reflect the reason for the discharge on habeas corpus. The record does reflect, however, that petitioner was not arrested on January 30 until after DiGerlando, who was then in police custody, had accused him of the murder (R. 30, 100). Since the legality of petitioner's arrest was not challenged at the trial, there is nothing in the record to show that whatever "defect of proof" caused the earlier discharge of petitioner on habeas corpus was still existent on January 30. And since the police had new evidence, e.g., the accusation of DiGerlando, on January 30 which they did not possess at the time of his arrest ten days earlier, the arrest on January 30 did not violate the habeas corpus act.

Petitioner also seeks support from that provision of Ch. 38, § 379 Ill. Rev. Stat. (1959) which forbids imprisonment "for the purpose of obtaining a confession." How far the statute reaches into ordinary police investigation practices is not clear, but certainly the Supreme Court of Illinois, having held in this very case that "The right of the police to interrogate suspects has never been seriously questioned" (R. 129) and "the police have not only the right but the duty to question suspects" (R. 130) and that the police have a "right to a reasonable opportunity to

interrogate outside the presence of counsel" (R. 134), would not find that the statute was violated here.

Third, even assuming that the arrest was illegal under Illinois law, that factor is not one which bears upon the question now at issue—whether petitioner's confession was voluntary or involuntary. Though this court has on occasion noted the fact of an illegal arrest when considering the question of voluntariness,[13] we can perceive no reason why a person who has been arrested "unlawfully" is under more compulsion to confess than is one who has been "lawfully" arrested. If, in fact, the average prisoner appreciates the often fine distinctions between the two cases (and here the question of whether petitioner's second arrest was lawful is extremely technical) then the opposite conclusion, as Professor Kamisar has pointed out, is more likely true.[14]

Fourth, prior to the filing of petitioner's Brief on the merits, no *Wong Sun* argument had ever been raised. Though this cause was not decided on rehearing by the Supreme Court of Illinois until months after this Court's decision in *Wong Sun*, the argument that, apart from the question of voluntariness, the confession is the product of an illegal arrest was not raised in that court. It was not raised, nor was *Wong Sun* even mentioned, in the Petition for Certiorari. Whatever relation an illegal arrest bears to the question of voluntariness, the argument that a confession must be excluded when the "product" of an illegal arrest, without more, is a very different one indeed. That argument is rooted squarely in the Fourth Amendment and does not come into play without allegation and proof of a violation of that provision. *Ker v. California*, 374 U. S.

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13. See *Ward v. Texas*, 316 U. S. 547, 552.

14. Kamisar, *What Is An "Involuntary" Confession?*, 17 Rutgers L. Rev. 728, 751 (1963).

23, 31-34; *Wong Sun* v. *United States*, 371 U. S. 471, 484-486; *Fahy* v. *Connecticut*, 375 U. S. 85, 90-91.

Since it has never been contended that petitioner's arrest on January 30 violated the Fourth Amendment, and since the *Wong Sun* argument only now appears for the first time in the face of this Court's express disapproval of "the practice of smuggling additional questions into a case after we grant certiorari" (*Irvine* v. *California*, 347 U. S. 128, 129), we believe it is not now in issue and that the petitioner's confession cannot be deemed inadmissible on this ground.[15]

G.

The Mental and Emotional Condition of Petitioner.

In his last argument upon the question of voluntariness petitioner makes several points which we believe require but short answer.

First we are told that petitioner's will was overborne largely because he was: (1) "only" twenty-two years of age; (2) of Mexican extraction; (3) had no past history of police contacts; (4) was "emotionally upset" at the police station. *Crooker* is distinguished because of the accused's law school background, while *Gallegos* v. *Colorado* is more eagerly advanced for the proposition that "the mere failure to advise that accused of his rights, absent any other elements of coercion, rendered his statement inadmissible because of his age and experience" (Br. 27-28).

Petitioner was not "only" twenty-two. He was twenty-two. He was not fourteen years of age and a child as was Gallegos. He was, as we have pointed out earlier in this Brief, married and the father of a child. Because the issue of voluntariness was not the prime question raised

15. See Rule 23(1)(c) of this Court; Stern and Gressman, *Supreme Court Practice*, § 6-42, pp. 248-249 (3rd ed. 1962).

by petitioner in the Criminal Court of Cook County (almost all, if not all, reliance being placed upon the denial of counsel during police questioning), the record is necessarily sketchy concerning precise details relevant to petitioner's psychological makeup and degree of maturity. The trial court which observed him firsthand found that his intelligence was impressive, ". . . he certainly is not ignorant by a long stretch of the imagination. He is pretty keen. . . ." (R. 41).

We do not think that any unusual significance can be attached to what petitioner calls his "minority group extraction" (Br. 27). There are no "majority" groups in this country or in the city of Chicago, so far as we are aware, that have descended mysteriously from some neutral stock and, presumably, carry the genes conferring immunity from easy persuasion by police authorities. There is no evidence that petitioner is foreign born as was the defendant in *Spano* v. *New York*, 360 U. S. 315. And while there is no evidence here that petitioner has any sort of police record, his several prior contacts with the police during the course of their investigation of the Valtierra murder, including a period of 15 hour detention which produced no confession, militate against the conclusion that he was easily overreached, especially when his repeated pre-arrest consultations with counsel are taken into account. Indeed, petitioner testified that when he heard that a warrant had been issued for his arrest he *voluntarily surrendered* to police authorities, sometime after the fifteen hour detention, and prior to his arrest on January 30, only to be sent away by a kindly police sergeant who told him he "shouldn't even be there" (R. 84).

Captain Flynn testified that petitioner was "nervous and agitated" at the time Flynn talked to him. Petitioner also told Flynn that the reason for his nervousness and agitation was his part in the Valtierra murder (R. 50). As the

Supreme Court of New Jersey has pointed out, "An interrogation, no matter how conscientiously conducted, is naturally bound . . . to evoke . . . nervouness . . . which will be heightened in a person who knows he is guilty by consciousness of guilt. . . ." *State* v. *Smith*, 161 A. 2d 520, 546.[16]

Finally, petitioner seeks to further distinguish *Crooker* on the ground that in that case "there was no contention of any causal relationship between [the denial of counsel] and the subsequent [confession]" (Br. 28). This is not so. In fact, the *Crooker* opinion expressly noted that "Petitioner's claim of coercion, then, depends almost entirely on denial of his request to contact counsel." 357 U. S. at 437-438.

To sum up, it is our belief that, taking into consideration all of the asserted circumstances which it is claimed bear upon the voluntary nature of the confession, this Court will not find that they are "irreconcilable with the possession of mental freedom" by petitioner. (*Ashcraft* v. *Tennessee*, 322 U. S. 143, 154.) We have here a twenty-two year old, married man, the father of a child, the beneficiary of extraordinary pre-arrest counseling by an attorney, and as is conceded upon this argument, one who, fully aware of his constitutional rights upon entering the station, confessed shortly after arrest, with the knowledge that a co-defendant had apparently confessed and was implicating him, and that others involved in the offense were then being questioned.[17] Ten days prior to the arrest he had undergone 15 hours of police custody without confession. After that experience he at one time voluntarily sought to place himself back into police custody when he thought a warrant

16. And see *Stein* v. *New York*, 346 U. S. 156, 185-186.

17. "That confession came at a time when he must have known that the police already knew enough . . . to make his implication inevitable. Stein held out until after Cooper had confessed and implicated him." *Stein* v. *New York*, 346 U. S. 156, 186 (and ft. 29.)

had been issued for his arrest. A close scrutiny of the original record containing petitioner's verbatim testimony on the motion to suppress the confession, and at the trial will reveal the deliberate, literate, and rational manner of the man.

Assuredly this Court "cannot escape the demands of judging or of making the difficult appraisals inherent in determining whether constitutional rights have been violated." We, however, believe that the resolution of this case is not difficult, and that this Court will be "impelled to the conclusion, from all of the facts presented, that the bounds of due process have [not] been exceeded." *Haynes* v. *Washington*, 373 U. S. 503, 515.

II.

THE RIGHT TO COUNSEL PROTECTED BY FOURTEENTH AMENDMENT DUE PROCESS DOES NOT EXTEND TO POST-ARREST QUESTIONING BY POLICE AND A CONFESSION, OTHERWISE VOLUNTARY, WHICH IS GIVEN AFTER THE OPPORTUNITY TO CONSULT WITH COUNSEL HAS BEEN REFUSED IS ADMISSIBLE IN STATE CRIMINAL TRIALS.

> *"I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?"*[18]

18. Wechsler, *Principles, Politics and Fundamental Law*, 21 (1961).

This case squarely raises "the most pervasive question in the field of constitutional-criminal procedure today."[19] When does the right of counsel, protected against state deprivation by the due process clause of the fourteenth amendment, begin? And once that is settled, two more questions must be answered. Are there rights to the aid of retained counsel protected from state deprivation by due process of law that the state need not affirmatively furnish to the indigent defendant? If the right to counsel begins at the moment of arrest, what are the consequences of its violation?

The facts which raise the issue here are not essentially in dispute. Petitioner was arrested by the Chicago police on a charge of murder sometime after 8:00 P.M. on January 30, 1960. He arrived at central police headquarters between 9:30 and 9:45 P.M. In the squadcar on the way to the station petitioner denied any knowledge of the crime and at the station he continued his denials. He said that he wished to consult his attorney before making any statement. Shortly after petitioner arrived at the station his attorney, Warren Wolfson, appeared and requested permission to see petitioner who had retained him sometime previously in connection with a civil matter and had consulted with him on the pending homicide investigation. The police refused to allow Wolfson to see petitioner on the ground that he had been in custody only a short time and they had not completed their questioning. Through an open door Wolfson signaled to defendant not to talk—and then left the station. Shortly after 10:00 P.M., petitioner gave an oral statement to detective Montejano accusing one Benedict DiGerlando of the killing, orally confessed to Chief Flynn at about 10:30 P.M. and gave

19. Kamisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 Minn. L. Rev. 1, 33 (1963).

a full written confession to an Assistant State's Attorney and his court reporter at about 11:30 P.M.

The thrust of petitioner's argument is this:

(1) the police have no "right" to question an accused following his arrest because of the federal privilege against self-incrimination and the Illinois statutory and federal constitutional rights to counsel (Br. 37);

(2) the exercise of this asserted "right" by the police after the accused, or retained counsel, has requested consultation with the other violates due process and any confession which is the product of such questioning is inadmissible in a state criminal trial. (Br. 37-42.)

We think petitioner's focus is wrong. We are not here concerned with the "rights" of the police, whatever they are and from wherever they flow. We think the essential concern is whether any federal constitutional right of the defendant has been abridged by the state action in this case. For if there is no constitutional warrant for overturning the state action questioned here, the "value choice" Illinois has made in allowing police interrogation following arrest, and in the absence of counsel, "must, of course, survive" without reference to the question of whether there is "authority for" or "the right to" such action on the part of the state authorities.[20]

At the outset, let it be clear that we are not here concerned with the fifth amendment privilege against self-incrimination, for that guarantee is not now enforceable against the states,[21] and we do not understand petitioner to contend to the contrary. Nor are the rights of counsel recognized by the Illinois statutory and constitutional provisions discussed by petitioner (Br. 12-13, 37) relevant to

20. Wechsler, *Principles, Politics and Fundamental Law*, 27 (1961).

21. *Twining* v. *New Jersey*, 211 U. S. 78; *Adamson* v. *California*, 332 U. S. 46; *Palko* v. *Connecticut*, 302 U. S. 319.

this argument for they have been authoritatively construed by the Supreme Court of Illinois not to foreclose the police conduct under scrutiny.[22]

A.

When Does the Right to Counsel Begin?

This Court has never held that the right to counsel protected by the fourteenth amendment attaches at the moment of arrest. We believe that in *Crooker* v. *California*, 357 U. S. 433 and *Cicenia* v. *LaGay*, 357 U. S. 504, this Court rejected the argument that it does.

In *Crooker*, Mr. Justice Clark stated the issue in this manner:

> "Petitioner reaches this position by reasoning *first* that he has been denied a due process right to representation and advice from his attorney, and secondly that the use of any confession obtained from him during the time of such a denial would itself be barred by the Due Process Clause, even though freely made. We think petitioner *fails to sustain the first point*, and therefore we do not reach the second." 357 U. S. at 438-439 (Emphasis added.)

If there is any question that this is not a holding that the right to counsel protected by due process does not attach from the moment of arrest, surely it should be put to rest by the very explicit language of Mr. Justice Harlan for the majority in the companion case of *Cicenia*:

> "The contention that petitioner *had a constitutional right to confer with counsel* is disposed of by *Crooker* v. *California*. . . . . In contrast, petitioner would have us hold that *any* state denial of a defendant's request to confer with counsel during police questioning violates due process, irrespective of the particular circum-

22. (R. 133.) And see *Powell* v. *Alabama*, 287 U. S. 45, 59-60.

> stances involved. Such a holding, in its ultimate reach, would mean that state police could not interrogate a suspect before giving him an opportunity to secure counsel." 357 U. S. at 508-509 (Emphasis added.)

Since both *Crooker* and *Cicenia* were capital cases, where the right to counsel was absolute and not dependent upon the "special circumstances" test of *Betts* v. *Brady*, 316 U. S. 455, we conclude that the essence of the Court's holdings in *Crooker* and *Cicenia* was that the right did not attach at the moment of arrest, although, as Mr. Justice Harlan remarked, "it is generally quite unclear in state law when the right to have counsel begins."

It is true that this Court also said in *Crooker* that "state refusal of a request to engage counsel violates due process . . . if the accused . . . is deprived of counsel for any part of the pretrial proceedings." However, a canvass of the cases announcing this principle fails to show that the Court has ever considered mere post-arrest interrogation to fall within the concept of "pre-trial" *proceedings*.

We begin with the fountainhead of the right to counsel cases—*Powell* v. *Alabama*, 287 U. S. 45. In *Powell*, defendants who were strangers to the community were rushed to trial in a capital case without the effective assistance of counsel. In his now famous and much quoted discussion of the right to counsel, Mr. Justice Sutherland concluded that a defendant "requires the guiding hand of counsel at *every step* in the *proceedings* against him." While of course this language may be read broadly to reach every citizen contact with the world of law enforcement; we believe that an earlier passage in the opinion illustrates what Justice Sutherland meant to include within that phrase:

> "In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the *proceedings* against these defendants, that is to say, *from the time of their arraignment until*

> *the beginning of their trial*, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during *that period* as at the trial itself." 287 U. S. at 57 (Emphasis added.)

One of the state cases cited with approval in support of this holding, *Batchelor* v. *State*, 125 N. E. 773 (Ind. 1920), is illustrative here. In *Batchelor*, the defendant was arrested and held incommunicado for five days. On the fifth day he was indicted and brought into court and arraigned. After pleading guilty and testifying at the arraignment, defendant was sentenced to death on the following day. All of these proceedings were had in the absence of counsel, although the defendant had requested the opportunity to consult with counsel soon after his arrest and while he was confined. The Supreme Court of Indiana held, as in *Powell*, that the right to counsel extended to "every stage of the proceedings" and voided the plea of guilty entered by the defendant at the arraignment and held involuntary a *judicial confession* given by the accused after pleading guilty. The confession was so labeled because:

> "The evidence was self-incriminating in its character and was not voluntarily given by appellant. It was given while he was in the custody of officers of the law *after he had been charged with the commission of a crime*. He was not advised as to his constitutional rights on the subject before he *testified*, and he had not been permitted to consult with counsel so as to be informed as to what his rights on the subject were. It has been frequently held that incriminating evidence elicited from an accused person under such circumstances is not voluntarily given." 125 N. E. at 778 (Emphasis added.)

The rationale and holdings of *Batchelor* characterize and delimit, we believe, the broad dictum of Justice Suther-

land in the *Powell* case. The "proceedings" during which the constitution protects and enforces the right to counsel begin at the invocation of the judicial process against the prisoner, and although the decisions have not been uniform, may include the period following the return of the indictment. (*Spano* v. *New York*, 360 U. S. 315, 324, 326, *concurring opinions*); the preliminary hearing (*White* v. *Maryland*, 373 U. S. 59); the arraignment (*Hamilton* v. *Alabama*, 368 U. S. 52) and pre-trial pleas of guilt (*House* v. *Mayo*, 324 U. S. 42; *Moore* v. *Michigan*, 355 U. S. 155; cf. *Chandler* v. *Fretag*, 348 U. S. 3.)

The concurring opinions in *Spano* v. *New York*, 360 U. S. 315 very sharply point up the difference between the question of the right to counsel before and the right to counsel after the invocation of the judicial process. Thus Mr. Justice Douglas was careful to note that:

> "We have often divided on whether state authorities may question a suspect for hours on end when he has no lawyer present and when he has demanded that he have the benefit of legal advice. * * * But here we deal not with a *suspect* but with a man who has been *formally charged* with a crime. The question is whether *after the indictment* and *before the trial* the Government can interrogate the accused in secret when he asked for his lawyer and when his request was denied. * * * We do not have here mere suspects who are being secretly interrogated by the police. . . ." 360 U. S. at 324-326. (Emphasis added.)

And Mr. Justice Stewart said:

> "Let it be emphasized at the outset that this is not a case where the police were questioning a suspect in the course of investigating an unsolved crime (citing *Crooker* and *Cicenia*). When the petitioner surrendered to the New York authorities he was under indictment for first degree murder." 360 U. S. at 327.

Though not involving post-arrest questioning by police authorities, *Re Groban*, 352 U. S. 330, is additional support for the proposition that such questioning in the absence of counsel is constitutionally permissible. In *Groban*, this Court upheld, under penalty of contempt, the power of a state to require persons to be sworn as witnesses at a hearing before a state fire marshal and to testify without the aid of counsel. The opinion for the Court is clear that the marshal conducts such a proceeding:

> "Solely to elicit facts relating to the causes and circumstances of the fire. The Fire Marshal's duty was to 'determine whether the fire was the result of carelessness or design,' and to *arrest* any person against whom there was sufficient evidence on which to base a charge of arson" 352 U. S. at 332. (Emphasis added.)

The Court then held:

> "The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of counsel. Appellants here are witnesses from whom information was sought as to the cause of the fire. * * * Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then his protection is the privilege against self-incrimination. * * * This is a privilege available in investigations as well as in prosecutions." 352 U. S. at 332-333.

The *Groban* holding is, we believe, controlling here. After the murder of Manuel Valtierra, it was the duty of the Chicago police to conduct an investigation to "elicit facts relating to the cause and circumstances of the [homicide.]" It was also their duty to prefer a *charge* against "any person against whom there was sufficient evidence on which to base a *charge* of [murder.]" Petitioner was a witness

"from whom information was sought as to the cause of the [homicide.]" Evidence obtained through police questioning did lead to the preference of a charge against petitioner and when such a charge was made he obtained "the presence of counsel for his defense." And during the period of police questioning "his protection [was] the privilege against self-incrimination."

Unlike *Groban*, however, petitioner was not compelled to speak at police headquarters. He could have availed himself of the privilege merely by refusing to answer questions. That he did not, that he voluntarily confessed, with full knowledge of his privilege which, as Mr. Justice Frankfurter has said, "has attained the familiarity of the comic strips,"[23] is not a fault of the state cognizable under the due process clause.

In *Anonymous* v. *Baker*, 360 U. S. 287, decided after *Groban*, *Crooker*, and *Cicenia*, this Court once again reaffirmed the rule that due process does not compel the state to allow or furnish the aid of counsel in the investigation stage prior to the filing of criminal charges against a person under questioning. Our reading of *Crooker* and *Cicenia*—that the due process right of counsel does not extend to post-arrest interrogation—was expressly confirmed by Mr. Justice Harlan:

> "Although we have held that in state criminal proceedings . . . a defendant has an unqualified right to be represented at trial by retained counsel, *Chandler* v. *Fretag*, 348 U. S. 3, 99 L. Ed. 4, 75 S. Ct. 1, *we have not extended that right to the investigation stages of such proceedings.* See *Cicenia* v. *La Gay*, . . . see also *Crooker* v. *California*. . . . " 360 U. S. at 294 (Emphasis added.)

We conclude, therefore, that it is the present view of this Court that the denial of counsel during post-arrest

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23. *Re Groban*, 352 U. S. 330, 337 (concurring opinion).

police questioning is not a denial of the right to counsel protected by the due process clause (*Cicenia* v. *La Gay*, 357 U. S. 504; *Crooker* v. *California*, 357 U. S. 433; *Re Groban*, 352 U. S. 330; *Anonymous* v. *Baker*, 360 U. S. 287)[24] although the lack of counsel during this period is one factor to be taken into account in determining the voluntariness of a confession (*Haley* v. *Ohio*, 332 U. S. 596; *Gallegos* v. *Colorado*, 370 U. S. 49; *Haynes* v. *Washington*, 373 U. S. 503) or the fundamental fairness of the totality of the state criminal proceedings culminating in the conviction. *Crooker* v. *California*, 357 U. S. 433.

If *Cicenia* is the law, then petitioner's claims cannot be distinguished from those raised in *Cicenia*. In both cases:

(1) petitioner was in his early twenties;

(2) petitioner conferred with retained counsel before being taken into custody;

(3) petitioner requested the opportunity to confer with counsel during the interrogation;

(4) counsel was present at the police station during the interrogation and was refused admittance;

(5) petitioner confessed in the absence of counsel.

If *Cicenia* is still *to be* the law, therefore, petitioner's argument here must be rejected, as he candidly admits by requesting this court to overrule that decision (Br. 42). We turn then to a consideration of that question.

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24. Inbau and Reid, *Criminal Interrogation and Confessions*, 171-172 (1962); Beaney, *Right To Counsel Before Arraignment*, 45 Minn. L. Rev. 771, 777 (1961).

B.

The Brief of Amicus Curiae.

With the permission of all parties, the American Civil Liberties Union has filed an *amicus* brief urging reversal and the overruling of *Crooker* v. *California* and *Cicenia* v. *LaGay*. The position of the *amicus*, however, is not consistent throughout the Brief. They urge first "the necessity of securing to *all persons* suspected or accused of crime the right to consult with counsel at every stage in the course of criminal proceedings from arrest through final judgment and appeal." (*Amicus* Br. 1) (Emphasis added.) They then request this Court to hold that "a confession obtained during police interrogation of a suspect in custody following their denial *of his request* to consult counsel is inadmissible in evidence under the due process clause . . . [because interrogation] . . . under these circumstances is *inherently coercive*. . . ." (*Amicus* Br. 3) (Emphasis added.) The scope of the requested ruling is later limited, however, to the case "where a prisoner suspected of a *capital crime* has been denied access to counsel . . ." (*Amicus* Br. 9-10, 14) (Emphasis added.)

Any answer to *amicus* upon the points set forth above would, of course, merely duplicate our answer to petitioner in other parts of this Brief. In the main, however, the brief for the *amicus* is devoted to excerpting and discussing interrogation techniques recommended for police investigators by recently published manuals purportedly incorporating "the interrogation practices which are in actual use by American police today" and "which are accepted as lawful and proper under the best current standards of professional police work." (*Amicus* Br. 4).

Any detailed examination and comment on all of

the tactics set forth in the manuals would be at once unnecessary and unjustified in terms of the space and time required for such a reply. Suffice it to say that there is no evidence in this record to show that the Chicago police generally employ the tactics objected to or that the more disquieting ones were employed against petitioner in this case. Of course private questioning of suspects in police custody lends itself to occasional police abuse (Cf. *Haynes* v. *Washington*, 373 U. S. 503, 514). But a sufficient answer to this is, as the Supreme Court of Illinois held below, that if "the police abuse their right to interrogate, the confession will be excluded." (R. 131).

By declining to engage in extended discussion concerning the interrogation techniques which *amicus* advances as sufficient reason to bar *all* police questioning, no matter how reasonable, in the absence of counsel, we do not wish to be understood as necessarily condoning any or all of them. Some are patently illegal and coercive, e.g., "securing the suspect's knees between the legs of the interrogator, holding the suspect's chin so that the interrogator can stare directly into his eyes"; ". . . shout a pertinent question and appear as though he [the interrogator] is beside himself with rage" (*Amicus* Br. 7); the use of the "reverse lineup" to the point where the suspect becomes "desperate"; to "interrogate steadily and without relent, leaving the subject no prospect of surcease . . . [the interrogator] . . . must dominate his subject and overwhelm him with his inexorable will . . . in a serious case, the interrogation may continue for days . . ." (*Amicus* Br. 8). Others may, in some instances, and in combination with other factors, be open to question in view of recent decisions of this Court, e.g., "The use of pretended sympathy and other emotional appeals . . ." (*Amicus* Br. 6). See *Spano* v. *New York*, 360 U. S. 315, 323.

C.

The Views of the Commentators.

Six years have elapsed since the *Crooker* and *Cicenia* decisions were handed down by this Court. Considering the passage of time, and the fact that three of the five Justices composing the majority no longer serve on the Court,[25] while of the four Justices in the minority all still serve, it would be surprising if considerable speculation over the continuing validity of *Crooker* and *Cicenia* had not accrued by now. And of course it has.

Even petitioner could not resist the urge to warn the Supreme Court of Illinois, in his answer to the Petition for Rehearing below, that it would affirm his conviction at the risk of being reversed because this "Court has not yet, since the retirement of three Justices who participated in that majority opinion [*Crooker*] had occasion to reconsider whether the . . . doctrine should continue to be applied in preference to the . . . rule espoused by the minority, all of whom remain on the bench today" (R. 122). Petitioner predicted that since "three Justices who were not present on the Court when it decided *Crooker* v. *California* (Justices Stewart, White and Goldberg) all joined in Mr. Justice Black's opinion [in *Gideon* v. *Wainwright*, 372 U. S. 335] without reservation . . . it is manifest . . . that the . . . result [reached by the *Crooker* minority] would . . . obtain when the Court will be faced with the problem posed by the case at bar" and that "the fate of *Crooker* v. *California* will be the same as the fate of *Betts* v. *Brady*, i.e., it will be reversed . . ." (R. 123-124).

In a final warning, the Supreme Court of Illinois was bluntly told that they "should not allow this opportunity,

25. Justices Frankfurter, Burton and Whittaker.

voluntarily to adopt the benevolent and just rule [petitioner's rule] to evaporate only to later be forced to accept it when the highest judicial authority in the land so commands" (R. 124).

Of course, such bold predictions would be unseemly and inappropriate to the pleadings here and petitioner, in his Brief, has quietly retreated from, to put it irreverently, counting his votes in this Court before they are hatched. The State of Illinois ventures no such speculations as to how the vote would be cast today. But some of the liberal commentators have not, in large measure, been so restrained, and now foresee easy reversal of *Crooker* and *Cicenia*.

Professor Broeder, for example, has said:

> "Accordingly, since *Wong Sun* gives *McNabb-Mallory* constitutional status in relation to both the states and the federal government in an opinion in which Mr. Justice Goldberg joined, it would be equally difficult for Mr. Justice Goldberg to draw the distinction [between *Mallory* and *Cicenia*] in constitutional terms assuming, which is difficult to believe, that he might wish to. This point, plus the overruling of *Betts* by *Gideon*, virtually compels the conclusion that the dissenting opinions in *Crooker* and *Cicenia* represent the view of a majority of the Court's present membership and that, at the least, due process now requires the exclusion of any confession obtained in the *absence of* counsel when a defendant has *requested* that one be *present* during the questioning. * * * Nor is it clear that any such request need be made by the defendant, or that the present Court would require one. Certainly none should be. . . ."[26]

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26. Broeder, *Wong Sun v. United States, A Study in Faith and Hope*, 42 Neb. L. Rev. 483, 606-607 (1963) (Emphasis added.) See also: Note, *Right To Counsel During Police Interrogation*, 16 Rutgers L. Rev. 573 (1962); King, *Developing A Future Constitutional Standard For Confessions*, 8 Wayne L. Rev. 481, 495 (1962).

We believe, however, that such exceedingly assumptive forecasts are unwarranted.

In the first place, it is easy enough to cull isolated *dictums* and phrases from the recent opinions of this Court to come to precisely the opposite view. For example, Mr. Chief Justice Warren, a member of the *Crooker* and *Cicenia* minorities, declined to reach a similar, but less far-reaching, result in *Spano* v. *New York*, 360 U. S. 315, 320. And Justices Douglas, Black and Brennan found some reason to distinguish *Crooker* from *Spano*, while Mr. Justice Stewart took pains to "let it be emphasized at the outset that this [*Spano*] is not a case where the police were questioning a suspect in the course of investigating an unsolved crime." (360 U. S. at 327.) For another example, Mr. Justice Goldberg, speaking for a majority of the Court in *Haynes* v. *Washington*, 373 U. S. 503, 515, was careful to say that "certainly, we do not mean to suggest that *all* interrogation of witnesses and suspects is impermissible. *Such questioning is undoubtedly an essential tool in effective law enforcement.* The line between proper and permissible police conduct and techniques is, at best, a difficult one to draw . . . ." (Emphasis added.)

All we mean to say by this review is that we believe that at least this court will re-examine the question in the light of, and with regard to, not only the facts of this case, but, in larger measure, the inevitable results of any decision overruling *Crooker* and *Cicenia*. For, if they go by the boards, they will not go easily. On the one hand, this Court must always maintain its duty to "exercise [a] judgment upon the whole course of [state] criminal proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward

those charged with the most heinous offenses."[27] And though "the State courts have the responsibility for securing the rudimentary requirements of a civilized order, in discharging that responsibility there hangs over them the reviewing power of this Court . . . [and when] . . . appeal is made to it, there is no escape."[28] On the other hand, "The nature of the duty . . . makes it especially important to be humble in exercising it. Humility in this context means an alert self-scrutiny so as to avoid infusing into the vagueness of a constitutional command one's merely private notions. Like other mortals, judges, though unaware, may be in the grip of prepossessions."[29]

Given these considerations; applying them especially to a case involving the issue of confessions,[30] we believe the Court will realize that in the kind of constitutional determination it faces here, "issues . . . are inescapably 'political'—political in the . . . sense that . . . they involve a choice among competing values or desires, a choice reflected in the legislative or executive action in question, which the [C]ourt must either condemn or condone" and that the choice must be made in full recognition of the "vital difference between legislative freedom to appraise the gains and losses in projected measures and the kind of principled appraisal, in respect of values that can reasonably be asserted to have constitutional dimension, that alone is the province of the [Court]."[31]

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27. *Malinski* v. *New York*, 324 U. S. 401, 412, 416-417 (concurring opinion).

28. *Watts* v. *Indiana*, 338 U. S. 49, 50.

29. *Haley* v. *Ohio*, 332 U. S. 596, 601, 602 (concurring opinion).

30. "As in all such cases, we are forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement." *Spano* v. *New York*, 360 U. S. 315.

31. Wechsler, *Principles, Politics And Fundamental Law*, 22 (1961).

But if decision here is to be inevitably abandoned to an extension of the right to counsel so that it begins at the moment of arrest as—the liberal commentators prophesy, because the votes for overturning *Crooker* and *Cicenia* are thought by them to now be there—let it at once be clear what such a decision means.

D.

What Gideon v. Wainwright and Related Cases Compel.

The decision, of course, means the end of confessions as a tool of law enforcement. It cannot be stated more plainly than that. For once this petitioner's claim with Illinois is settled, the inevitable progression of the law must follow:

First, if the right to counsel attaches at the moment of arrest, if, as the dissent in *Crooker* expressed it, the "demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at any time after the moment of arrest" (357 U. S. at 448), then it can hardly be denied that this right must be available to the poor as well as to the rich. For "the further you push back the right to counsel for the one who can afford it, the wider the disparity in treatment between him and the man who cannot. If . . . fundamental fairness does require that the person who can afford a lawyer must be given one at any time after his arrest, how in the world can you continue to deny counsel to the indigent at that stage and each and every subsequent stage?"[32] If petitioner was entitled to counsel immediately upon being taken into custody on January 30, then so is every defendant. Any other conclusion is foreclosed by

32. Kamisar, *The Right To Counsel And The Fourteenth Amendment: A Dialogue On "The Most Persuasive Right" Of An Accused*, 30 U. Chi. L. Rev. 1, 9 (1962).

the opinions of this Court in *Gideon* v. *Wainwright*, 372 U. S. 335 and *Griffin* v. *Illinois*, 351 U. S. 12.

Second, if indigent criminal defendants are entitled to counsel from the moment of arrest, then already established law makes it clear that such a right does not depend upon a request. In other words, not only must the state furnish counsel to the indigent defendant at this stage of the criminal proceeding, it must make make sure that he does not waive the right through ignorance of its existence, for "it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend upon a request." *Carnley* v. *Cochran*, 369 U. S. 506, 513.

Given these two holdings—which must inexorably follow the overruling of *Crooker* and *Cicenia*—we may pause to examine the consequences to law enforcement which can easily be foreseen even at this juncture:

(1) "To push the right to counsel back to the point of arrest and to exclude all incriminating statements obtained from an uncounselled defendant any time thereafter as a product of a fourteenth amendment violation would be, in effect, to impose the *McNabb-Mallory* rule on the states."[33] Indeed, it would be to go beyond the *Mallory* rule which forbids the admission in evidence only those statements taken during a period of unlawful detention which may not, in any given case, begin at the moment of arrest.

(2) It throws onto the police the terrible administrative burden of determining who qualifies as an indigent entitled to the appointment of counsel by the state. It may also saddle the police with the task of appointing counsel in the squadcar or at the precinct station at any hour of the day or night.

(3) Since no confession may be taken in the absence

33. Kamisar, *The Right To Counsel And The Fourteenth Amendment: A Dialogue On "The Most Persuasive Right" Of An Accused*, 30 U. Chi. L. Rev. 1, 11 (1962).

> of counsel, and since no competent counsel will allow his client to confess (especially would this be true in the case of appointed counsel whose failings are laid to the state), if only to avoid the ever increasing risk of having his competency attacked on another day and in another forum, it means simply that police questioning of suspects, indispensable to law enforcement, is at an end.

We could, of course, pursue further the logical progression of the consequences of overruling *Crooker* and *Cicenia*. Though this Court could not imagine in 1958, for example, that "Refusal by state authorities of the request to contact counsel necessarily would then be an absolute bar to conviction,"[34] it has, since that time, and based largely upon the rationale of the *Crooker* dissent, been so held by a Connecticut appellate court in *State* v. *Krozel*, 24 Conn. Supp. 266, 190 A. 2d 61. And because the newly extended right to counsel would, in all probability, be held to apply to those convictions occurring before the decision in this case, and taking into account the rule that severely limits the doctrine of waiver in preventing relief through the remedy of habeas corpus in the federal courts,[35] the extent to which all existent convictions of indigent defendants who were without counsel from the moment of arrest would now be in serious jeopardy—at least in those cases where a confession was the product of police interrogation in the absence of counsel—can easily be imagined.

Something should be said about the decision of the New York Court of Appeals in *People* v. *Donovan*, 193 N. E. 2d 628, upon which petitioner most heavily relies (Br. 38-42). It is true that *Donovan* finds violations of the New York right to counsel provisions and the New York privilege against self-incrimination involved in the taking of a confession after a defendant has requested, and been

34. *Crooker* v. *California*, 357 U. S. 433, 441.

35. *Fay* v. *Noia*, 372 U. S. 391, 438-440.

denied, counsel. The court was sharply split—it adopted the new rule by the margin of one vote, the majority expressly rejecting the opinion of the Supreme Court of Illinois in the *Escobedo* case. What the resulting impact on law enforcement in that state will be should be determined in short order. But at least this much is clear. The decision was a matter of free choice for the courts of New York. It was not compelled by federal due process.

When this Court adopted *Mapp* v. *Ohio*, 367 U. S. 643, predictable outcries were heard from prosecutors and police of non-exclusionary rule states that their law enforcement processes had suffered a most grievous blow. And yet those voices were muted even before they began, because of the simple fact that for a number of years approximately half the states of this union have followed the exclusionary rule without critical loss in police effectiveness. Before this Court adopted *Gideon* v. *Wainwright*, 372 U. S. 335, the voices of several states were heard in protest that their established systems of criminal law enforcement would suffer irreparably. And yet twenty-two states, including Illinois, joined as *amici curiae* to urge the extension of the right to counsel for indigent prisoners to all felony cases.

A rule establishing the right to counsel at the moment of arrest, however, stands upon a much different footing. We believe, with Justice Walter Schaefer of the Supreme Court of Illinois, that due process "includes those procedures that are fair and feasible in the light of then existing values and capabilities."[36] Extension of the right to counsel back to the moment of arrest is neither fair nor feasible at this moment in the administration of criminal justice in the fifty states. This Court may, by the adoption of such a rule, outlaw confessions. But the police will not abandon their practice of questioning suspects after arrest

36. Schaefer, *Federalism And State Criminal Procedure*, 70 Harv. L. Rev. 1, 6 (1956).

and before arraignment. And not because of any disrespect for this Court and its teachings, but simply because society will not let them, because society cannot let them. The "deeply rooted feelings of the community"[37] will demand that those who murder and rape and would escape unknown—but for the confession following arrest—be at least unmasked though they may go unwhipped of justice.

Petitioner concludes that "The most persuasive brief that could be proposed by petitioner has already been written .... [in] the opinion filed in *Crooker* v. *California* on behalf of the four dissenting justices . . ." (Br. 37). We find ourselves in the same position. The best argument that can be made for the affirmance of this conviction was made in 1949, almost 15 years ago. Mr. Justice Jackson said then:

> "I suppose no one would doubt that our Constitution and Bill of Rights, grounded in revolt against the arbitrary measures of George III and in the philosophy of the French Revolution, represent the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself. They were so intended and should be so interpreted. It cannot be denied that, even if construed as these provisions traditionally have been, they contain an aggregate of restrictions which seriously limit the power of society to solve such crimes as confront us in these cases. Those retrictions we should not for that reason cast aside, but that is good reason for indulging in no unnecessary expansion of them.
>
> I doubt very much if they require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does; the people of this country must discipline themselves to seeing their police stand by helpless while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the

37. *Haley* v. *Ohio*, 332 U. S. 596, 601, 604 (concurring opinion).

fairness which we know as 'due process of law'? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the persent, I should not increase the handicap on society." *Watts* v. *Indiana*, 338 U. S. 49, 61-62. (Concurring opinion.)

Criminal defendants, rich as well as poor, enjoy more protection from unjust conviction today than at any time in our history. "The terrible engine" of the criminal law has been repeatedly braked by this Court, by state courts and legislatures and by fair and honest administration of the law by prosecutors and police. We need now to guard against its derailment.

To be sure, Danny Escobedo would not have confessed had he been allowed to consult his attorney at the police station. But then, had he consulted with his attorney beforehand, he would not have murdered Manuel Valtierra either. "Someday perhaps, if and when we are living in the best of all worlds (or at least a better one), rich and poor alike will be offered the services of a lawyer immediately after arrest."[38] Someday too, perhaps, if and when we are living in the best of all worlds (or at least a better one), men will not, in the dead of night and in the eyes of God only, murder their fellow men.

38. Kamisar, *The Right To Counsel And The Fourteenth Amendment: A Dialogue On "The Most Persuasive Right" Of An Accused*, 30 U. Chi. L. Rev. 1, 11 (1962).

CONCLUSION.

Because petitioner's confession was obtained without coercion of any sort, the judgment of the Supreme Court of Illinois should be affirmed and this Court should reaffirm its holdings in *Crooker* v. *California*, 357 U. S. 504 and *Cicenia* v. *LaGay*, 357 U. S. 433, holding that the right to counsel does not begin at the moment of arrest by the command of due process.

Respectfully submitted,

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